88-1485 (3)

Supreme Court, U.S.
FILED
APR 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

H.C. ELLIOTT, INC.

Petitioner,

v.

CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA, a pension trust,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

JOHN T. HAYDEN, ESQ.
Counsel of Record
KAREN E. FORD, ESQ.
JAMES P. BAKER, ESQ.
LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation
650 California Street,
20th Floor
San Francisco, California
94108-2693
Telephone: (415) 433-1940

Attorneys for Petitioner
H.C. ELLIOTT, INC.

10 PM

TABLE OF CONTENTS

		PAGE(S)
I.	The Trust Fund Erroneously Argues That The Decision Below Does Not Conflict With Decisions Of Other Courts Of Appeal	2
II.	Respondent's Opposition Ignores The Statutes Legislative History And Erroneously Relies On Evidence Not Properly Part Of the Record Below	6

TABLE OF AUTHORITIES

CASES	PAGE(S)
Connolly v. *PBGC*, 475 U.S. 211, 106 S. Ct. 1018 (1986)	2
H.C. Elliott, 859 F.2d 808 (9th Cir. 1988)	3,4,5
ILGWU National Retirement Fund v. *Levy Brothers Frocks*, 846 F.2d 879 (2d Cir. 1988)	3,4
Refined Sugars, Inc. v. *Local 807 Labor-Management Pension Fund*, 580 F.Supp. 1457 (S.D.N.Y. 1984) (*Refined Sugars I*)	3,4
Refined Sugars, Inc. v. *Local 807 Labor-Management Pension Fund*, 632 F.Supp. 630 (S.D.N.Y. 1986) (*Refined Sugars II*)	4
U.S. v. *Cannons*, 534 F.2d 139 (9th Cir. 1976)	6
Union Asphalts & Road Oils v. *Mo-Kan*, 857 F.2d 1230 (8th Cir. 1988)	5
Wood v. *Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515 (9th Cir. 1983)	6

STATUTES	
29 U.S.C. § 1002(5)	5
29 U.S.C. § 1301(b)(1)	5
Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1453	*passim*
29 U.S.C. § 1383(a)	5
29 U.S.C. § 1383(b)	5
29 U.S.C. § 1383(a)(1)	5
29 U.S.C. § 1383(b)(2)	1,6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

H.C. ELLIOTT, INC.

Petitioner,

v.

CARPENTERS PENSION TRUST FUND
FOR NORTHERN CALIFORNIA, a pension trust,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

The Carpenters Pension Trust Fund for Northern California, in its opposing brief in No. 88-1485, fails to effectively rebut any of Petitioner's arguments in its petition for a writ of *certiorari.* Instead, the Carpenters Pension Trust Fund for Northern California (hereafter "Trust Fund") sidesteps the issues before the Court in order to deliver a sermon extolling the virtues of the Multiemployer Pension Plan Amendments Act of 1980 (hereinafter "MPPAA") (29 U.S.C. §§ 1381-1453). The virtues of the MPPAA are not, however, the issue in this case. The issue before this Court is who is an employer "continue[ing] to perform work" within the jurisdiction of a construction labor agreement for purposes of determining withdrawal liability under 29 U.S.C. § 1383(b)(2).

In its panic to prevent a careful review of the lower courts' decisions, the Trust Fund takes two contradictory positions. Its first reason for arguing against the issuance of a writ is that the decision below does not raise novel issues requiring Supreme Court review (Brief in Opposition, p. 3).

However, just three pages later the Trust Fund emphatically points out:

> No other circuit court has addressed this issue. In fact, the district court below noted that the '. . . case presented novel issues, ...'

Brief in Opposition, p. 6.

The Trust Fund thus asks this Court to chart a course between the Scylla of the general virtues of multiemployer withdrawal liability and the Charybdis of its logical conundrum that the question presented is both not novel and novel.

The Trust Fund's attempt by its truncated argument to shift the Court's attention from the enormity of the issue as to who is an employer in the construction industry for pension withdrawal liability purposes, to a case supporting the general principle of proportional employer liability for pension withdrawal liability lays bare the flaw in the Trust Fund's reasoning. If the statute governing withdrawal liability for construction employers could be rewritten so as to do what the Trust Fund says it means, it would have the effect of writing the building and construction industry exception out of the statute. The Trust Fund completely ignores the legislative history with respect to the building and construction industry exception, preferring instead to quote this Court's opinion in *Connolly* v. *PBGC*, 475 U.S. 211, 106 S. Ct. 1018 (1986) at length where this Court upheld the constitutionality of the MPPAA.

I. The Trust Fund Erroneously Argues That The Decision Below Does Not Conflict With Decisions Of Other Courts Of Appeal.

The Trust Fund attempts to sidestep the problem of conflict among the circuits by diverting this Court's attention to other issues not relevant to this case. The Trust Fund suggests, "neither Circuit Court cases cited by Elliott as conflicting touches upon the issues here" (Brief in Opposition, p. 6). The Trust Fund does not, however, bother to explain why this is the case.

In *ILGWU National Retirement Fund* v. *Levy Brothers Frocks,* 846 F.2d 879 (2d Cir. 1988), one of the key issues presented was whether or not the defunct Levy Brothers Frocks ("corporation") was an employer subject to MPPAA. The Trust Fund attempts to distinguish *Levy Brothers Frocks* by snatching one sentence out of context and suggesting that this somehow proves the case is not relevant. The Trust Fund quotes the following:

> The key issue on appeal is whether the corporation is precluded from challenging the fund's determination of withdrawal liability because the corporation did not seek to arbitrate the question.

Id. at 884 (Brief in Opposition, p. 6).

The Trust Fund ignores the balance of the paragraph in which this same quote begins that deals with the issue as to who is an employer for withdrawal liability purposes.

> The corporation, however, claims that since it never agreed to the collective bargaining agreement or related agreement during the relevant time period, it was never subject to MPPAA and therefore was not obligated to submit to arbitration. The corporation relies upon *Refined Sugars, Inc.* v. *Local 807 Labor-Management Pension Fund,* 580 F. Supp. 1457, 1462 (S.D.N.Y. 1984) (*Refined Sugars I*) for the proposition that a party cannot be compelled to arbitrate a dispute over withdrawal liability if it is not subject to MPPAA.

Id. at 884.

The Trust Fund incredibly characterizes *Levy Brothers Frocks* as holding:

> That the corporation had an obligation to arbitrate the withdrawal liability dispute notwithstanding the fact that the liability claim included calculations based upon a predecessor's contributions. The decision is actually consistent with the *Elliott* decision

> of the Ninth Circuit Court since the corporation was deemed an employer by virtue of its prior, pre-withdrawal, relationship to its employees and the Fund. .

(Brief in Opposition, pp. 6-7.)

The Trust Fund fails to point out that the corporation in *Levy Brothers Frocks* was one and the same with its predecessor. The Court concluded:

> The corporation's principals, when operating as a partnership, made payments to the Fund for years and, even after the change in the form of doing business from a partnership to a corporation, these benefit payments continued until operations ceased. We need not decide at what point an employer's connection with a fund would be so attenuated as to support a defense that it was not an 'employer' within the meaning of section 1401 and thus not obligated to submit to arbitration.

Id. at 886.

The Trust Fund's conclusion that the decision in *Levy Brothers Frocks* is "actually consistent" with the *Elliott* decision "since the corporation was deemed an employer by virtue of its prior, pre-withdrawal, relationship to its employees and the fund" is absurd. In *Levy Brothers Frocks* there were no intervening employers as there are in *H.C. Elliott.* In *Levy Brothers Frocks,* there was an identity of ownership throughout the relevant time period. In *Levy Brothers Frocks,* the Second Circuit pointed out that in a case such as *H.C. Elliott* where there are intervening employers, *there would be no withdrawal liability:*

> The question presented in the *Refined Sugars* litigation was whether a sugar refiner that had employed an independent trucking company to operate its fleet of trucks was an 'employer' with respect to the employees of the trucking company. *Refined Sugars,*

> *Inc.* v. *Local 807 Labor-Management Pension Fund*, 632 F. Supp. 630, 631 (S.D.N.Y. 1986) (*Refined Sugars II*). In *Refined Sugars II*, the Court concluded that the refiner was not an 'employer' within the meaning of MPPAA since (1) the refiner was not the 'direct employer' of the covered employees, *see* 29 U.S.C. § 1002(5); and (2) the refiner and the trucking company were not under common control within the meaning of 29 U.S.C. § 1301(b)(1). *Id.* at 632.

Id. at 884-885.

It is undisputed that H.C. Elliott and its independent carpentry subcontractors were not under common control. Because H.C. Elliott used independent contractors to perform all carpentry work after 1982, it stands reason on its head to hold that H.C. Elliott continued to be the direct employer of the same employees on whose behalf the Trust Fund now seeks to collect withdrawal liability.

The Trust Fund next incredibly asserts that a case whose key issue was who was an employer for purposes of the building and construction industry exception to MPPAA is somehow irrelevant to the issue before this Court. The decision of the Eighth Circuit Court of Appeals in *Union Asphalts & Road Oils* v. *Mo-Kan Teamsters Pension Fund*, 857 F.2d 1230 (8th Cir. 1988), is especially important due to the erroneous ruling by the Ninth Circuit that 29 U.S.C. § 1383(a)(1) was determinative as to Elliott's liability for withdrawal from the Multiemployer Pension Plan (*H.C. Elliott*, 859 F.2d 808 (9th Cir. 1988) at 813). Neither the legislative history nor the decision of the Eighth Circuit in *Mo-Kan* support this holding. Elliott's liability is controlled by § 1383(b), not § 1383(a). *See Union Asphalts & Road Oils, Inc.* v. *Mo-Kan Teamsters Pension Fund*, 857 F.2d 1230 (8th Cir. 1988) at 1232.

II. Respondent's Opposition Ignores The Statutes Legislative History And Erroneously Relies On Evidence Not Properly Part Of the Record Below.

The importance and substantiality of the question presented as to who is an employer for purposes of the building and construction industry exception to the Multiemployer Pension Plan Amendments Act of 1980 have in no way been rebutted. The Trust Fund has failed to address the fact that the decision below both conflicts with the legislative history of 29 U.S.C. § 1383(b)(2) and completely ignores the legislative exhortation that withdrawal liability for construction industry employers be "narrowly limited."

The Trust Fund quotes at length from a 1985 PBGC opinion letter in its Brief in Opposition (pp. 4-5). Elliott's Reply Brief in the court below and in its Petition noted that this same PBGC opinion letter was not properly part of the court record, incorrectly interpreted statutory requirements, and was contradictory of other PBGC letters (Appellant's Reply Brief, p. 12; Petition for Writ of Certiorari, p. 14).

Only after the parties had concluded their supplemental briefing as directed by the Court order, and the matter stood submitted, did the Trust Fund "discover" and mail this opinion letter to the Court. Documents filed after the entry of an order and which were not before the District Court when it made its order are not a proper part of the record on appeal and should not be considered on appeal. *See Wood* v. *Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1519 (9th Cir. 1983); *U.S.* v. *Cannons*, 534 F.2d 139, 140 (9th Cir. 1976).

In any event, this Court should disregard the aforementioned PBGC opinion letter because it incorrectly interprets the meaning of the statute here at issue and is contradictory to other opinion letters of equal weight.

In light of the inability of the Trust Fund to address the issues presented in the Petition without grossly distorting the clear meaning and legislative history of the statute and because the Trust Fund has all but ignored that a conflict exists among the circuits concerning who is a construction industry employer for withdrawal liability purposes, the need for plenary review of the action below is indisputable; indeed, Petitioner suggests that summary reversal is now in order.

DATED: April 14, 1989.

Respectfully submitted,

LITTLER, MENDELSON, FASTIFF
& TICHY
A Professional Corporation

JOHN T. HAYDEN
Counsel of Record
KAREN E. FORD
JAMES P. BAKER

Attorneys for Petitioner
H.C. ELLIOTT, INC.